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No. 08-601

In the
Supreme Court of the United States

CLEVELAND CONSTRUCTION, INC.,
Petitioner,
v.
CITY OF CINCINNATI, OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a municipality should be subject to liability for compensatory damages including lost profits under a successful 42 U.S.C. § 1983 claim, where its treatment of bidders and subcontractors using race- and sex-based classifications violates the Equal Protection Clause, and when it rejects the bid of the lowest and otherwise qualified bidder in violation of its own local rules.

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Beard, Paul J., II & Luther, Robert, III, *A Superintendent's Guide to Student Free Speech in California Public Schools*, 12 U.C. Davis J. Juv. L. & Pol'y 381 (2008) 8

Brown, Mark R., *Deterring Bully Government: A Sovereign Dilemma*, 76 Tul. L. Rev. 149 (2001) 14

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Eisenberg, Theodore, *Cases and Materials on Civil Rights Legislation* (3d ed. 1991) ... 15-16

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Kasarda, Ralph W. & Luther, Robert, III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under Section 1983 When Unconstitutional Race & Sex Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 Geo. Mason U. Civ. Rts. L.J. (forthcoming Mar. 2009), *available at* http://ssrn.com/abstract =1284702 (last visited Dec. 1, 2008) 3, 11

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner Cleveland Construction.[1] For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In furtherance of PLF's continuing mission to defend individual and economic liberties, PLF strongly supports the policy that public contracts should be awarded to the lowest responsible bidder and that low bidders who have been wrongfully denied the award of public contracts on the basis of

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

race or sex, or deprived of a constitutionally protected property interest, should be compensated to the full extent of their losses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Despite Justice John Marshall Harlan's admonition over 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), municipalities across the country continue to ignore this truism and the subsequent supporting case law by adopting unconstitutional race- and sex-based preference programs in public contracting, employment, and education. In the case at bar, the Cincinnati City Council adopted an unconstitutional minority business enterprise/women business enterprise program that was inextricably intertwined with the City of Cincinnati's bidding process. *Cleveland Constr., Inc. v. City of Cincinnati*, 864 N.E.2d 116, 127 (Ohio Ct. App. 2006). There is no dispute that Cleveland Construction, while being impermissibly pressured by the City of Cincinnati to give unconstitutional race- and sex-based preferences, *id.* at 123, 127, submitted the lowest bid on a drywall contract—on two separate occasions. *Id.* at 121-22. The City of Cincinnati then abused its authority and exceeded its discretion when it flagrantly violated its own fixed spending cap and awarded the drywall contract to the bidder whose bid grossly exceeded the bid of Cleveland Construction. *Id.* at 122, 124.

These disturbing and undeniable facts led the First Appellate District Court of Ohio to hold that Cleveland Construction was entitled to seek lost profits

as a measure of its damages for the City of Cincinnati's constitutional tort. *Id.* at 130. In a curt six-page decision, the Ohio Supreme Court ignored completely the unique factual predicate that brings this case outside the body of state public contracting law and into the realm of constitutional tort and equal protection analysis. Instead, the court addressed only the narrow issue of whether the City of Cincinnati abused its discretion in the award of the drywall contract, and then reversed the two lower courts. The decision of the Ohio Supreme Court has the effect of condoning the reprehensible behavior of City officials acting under color of law. *See Cleveland Constr. v. City of Cincinnati*, 888 N.E.2d 1068, 1073 (Ohio 2008) ("[E]fforts to improve the city's bidding procedures must be directed toward the city's governing body or to the General Assembly to establish stricter requirements in the bidding process.") (Lundberg Stratton, J., concurring); *see also* Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under Section 1983 When Unconstitutional Race & Sex Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 Geo. Mason U. Civ. Rts. L.J. (forthcoming Mar. 2009) (arguing that by failing to address the constitutional torts committed by the City of Cincinnati, the Supreme Court of Ohio abdicated its duty to correct the misconduct of abusive local government officials).[2]

It is imperative that the Court accept certiorari in this case and reverse the decision of the court below which completely ignored the unchecked discretion

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[2] *Available at* http://ssrn.com/abstract=1284702 (last visited Dec. 1, 2008).

displayed by Cincinnati public officials who violated their own ordinances and wasted taxpayer dollars by perpetuating discriminatory contracting practices. Without this Court's intervention, not only will Cleveland Construction be forever denied its just remedies pursuant to its successful Section 1983 claim, but numerous municipalities, wherever they may be located across the nation, will be undeterred in their tolerance of unconstitutional race- and sex-based schemes.

REASONS FOR GRANTING THE WRIT

This case presents an important public policy consideration—whether under 42 U.S.C. § 1983, a municipality should be subject to tort liability for compensatory damages including lost profits when, through a facially unconstitutional ordinance, bidders are impermissibly pressured and coaxed into discriminating on the basis of race and sex in a manner which undermines the bidding process, and prevents certain contractors from competing on an equal footing. The public interest, neglected by the court below, can best be served under these circumstances by allowing the lowest qualified bidder in this case to seek compensatory damages, including lost profits.

I

INTERVENTION BY THIS COURT IS NECESSARY TO ENSURE THAT PARTIES WHO PREVAIL ON A CLAIM UNDER 42 U.S.C. § 1983 WILL BE AWARDED COMPENSATION AS CONGRESS INTENDED

Section 1983 provides a remedy against "any person" who, under color of state law, deprives another

of rights protected by the Constitution. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120-21 (1992). Municipalities are to be included among those persons to whom Section 1983 applies. *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690 (1978). One of the main purposes of Section 1983 is to provide compensation to the victim for past abuses. *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978) ("The policies underlying § 1983, include compensation of persons injured by deprivation of federal rights."); *see Carey v. Piphus*, 435 U.S. 247, 256-57 (1978) ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.").

The Ohio Supreme Court apparently overlooked the fact that Cleveland Construction prevailed on its Section 1983 claim. In its action, Cleveland Construction alleged that the City of Cincinnati's Small Business Enterprise (SBE) Program was unconstitutional and that its rights were violated under 42 U.S.C. § 1983. *Cleveland Constr. Inc.*, 864 N.E.2d at 122. The trial court found that the City of Cincinnati's SBE Program created race- and sex-based classifications that rendered the program facially unconstitutional. *Id.* at 123. The City of Cincinnati "effectively conceded" that its contracting procedures were unconstitutional by failing to put forth any argument or evidence during the trial to demonstrate that its SBE Program could withstand strict scrutiny. *Id.* at 126-27.

The unconstitutional Minority Business Enterprise (MBE) and Woman Business Enterprise

(WBE) requirements were inseparably woven into the City of Cincinnati's SBE Program. Under such a program, Cleveland Construction was not at liberty to focus strictly on meeting the SBE quota. Cleveland Construction was forced to waste time and energy by conducting outreach to MBEs and WBEs in an attempt to satisfy each of these different program goals. Cleveland Construction knew that if its efforts to attain these goals did not satisfy City personnel, it could face serious repercussions. Under the SBE Program, contractors who submitted bids were forced to provide detailed descriptions of the techniques they employed in their mandatory attempts to satisfy MBE and WBE participation goals. *Id.* at 127. These efforts were then scrutinized by City personnel. *Id.* If the City of Cincinnati deemed that a bid's utilization percentage for MBEs and WBEs was too low, the contractor was subject to possible investigation for discrimination. *Id.* The City of Cincinnati thus impermissibly pressured and encouraged contractors like Cleveland Construction to select subcontractors and employees on the basis of race and sex. *Id.* at 123, 127. Because Cleveland Construction itself is not a MBE or WBE, it could not compete on the same footing as bidders who were, or who used subcontractors who were, of the "right" race or sex.

The state appellate court affirmed the unconstitutionality of the SBE Program, and recognized that Cleveland Construction was entitled to remedies pursuant to its successful Section 1983 claim stemming from the City's impermissible program. *Id.* at 129. Finding that a jury could have concluded that Cleveland Construction established all elements of its Section 1983 claim for damages, the court remanded the case for a new trial on liability and damages with

respect to the lost profits claim under Section 1983. *Id.* at 130.

The Ohio Supreme Court's opinion reflects that it failed to give *any* consideration to Cleveland Construction's meritorious equal protection claim. The fact that the City of Cincinnati violated Cleveland Construction's constitutional rights through a race- and sex-based contracting scheme that was struck down by the two lower courts is *completely omitted* from the decision of the Ohio Supreme Court which eliminates Cleveland Construction's entitlement to damages. Through its decision, which focused on the singular and most narrow issue of the case—whether lost profits can be awarded under state law—the court ensured that Cleveland Construction will never be justly compensated for the violation of its constitutional rights by the City of Cincinnati's illegal race- and sex-based bidding practices.

Cleveland Construction prevailed on its Section 1983 claim, and that victory was never overturned. Cleveland Construction is therefore still entitled to compensation under constitutional tort theory, which is not constrained by state law principles. *See* 1B Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* 16-73 (4th ed. 2007) ("Because the § 1983 damages principles enunciated by the Supreme Court are based on federal standards, state law monetary limitations on the recovery of damages should not be applied to § 1983 claims."). In some cases, the interests protected by a particular constitutional right may not be protected by an analogous branch of the common law torts. *Carey*, 435 U.S. at 258. In those cases, courts must adapt common-law rules of damages to provide "fair

compensation for injuries caused by the deprivation of a constitutional right." *Id.*

State law can grant citizens more rights than the Federal Constitution guarantees, but in no circumstances may state law ever reduce its citizens' rights below the protections that the Federal Constitution affords. *See Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 535 (1982) (A state can choose to do "more" than the Fourteenth Amendment requires, but a state may not "inhibit enforcement of any federal law or constitutional requirement."); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997) ("States are free to make or not make any constitutionally permissible legislative classification."); *cf.* Paul J. Beard II & Robert Luther III, *A Superintendent's Guide to Student Free Speech in California Public Schools*, 12 U.C. Davis J. Juv. L. & Pol'y 381, 388 (2008) ("State and local laws could, of course, provide greater protection for student speech, but those laws had to afford students at least as much protection as the First Amendment."). By resorting to state standards and refusing to allow Cleveland Construction to prove its damages for its meritorious Section 1983 claim, the Ohio Supreme Court reduced Cleveland Construction's rights below the protections afforded by the Federal Constitution.

A party is entitled to monetary remedies pursuant to Section 1983 for the violation of its rights under the Equal Protection Clause. Accordingly, the decision of the Ohio Supreme Court must be reversed in this case to ensure that courts award compensatory damages in furtherance of congressional intent.

II

COURTS MUST AWARD COMPENSATORY DAMAGES, INCLUDING LOST PROFITS, TO BEST DETER FUTURE MISCONDUCT BY MUNICIPALITIES THAT ESTABLISH UNCONSTITUTIONAL RACE- AND SEX-BASED PREFERENCE SCHEMES

A. The Ohio Supreme Court Decision Conflicts With This Court's Decisions Recognizing That the Purpose of 42 U.S.C. § 1983 Is to Compensate the Victim and Serve as a Deterrent in the Public Interest

This Court has consistently held that the purpose of Section 1983 is to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations. *E.g.*, *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) ("Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."); *Robertson*, 436 U.S. at 590-91 ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."). A municipality has no "discretion" to violate the Federal Constitution; "its dictates are absolute and imperative." *Owen*, 445 U.S. at 649. When rendering judgment on a municipality's conduct in a Section 1983 action, the courts seek neither to second-guess the reasonableness of the city's conduct nor to interfere with the local government's resolution of competing policy considerations. Rather, the courts

look only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. *Id.* The Ohio Supreme Court's primary focus should not have been on the discretion of the city officials, but on the City of Cincinnati's constitutional abuses. These abuses were made all the more outrageous by the fact the City conceded that its SBE Program could not withstand strict scrutiny, thereby admitting to the unconstitutionality of its program. *Cleveland Constr.*, 864 N.E.2d at 127.

In *Owen*, a former police chief who alleged that he was discharged in violation of his substantive and procedural due process rights brought suit under Section 1983 against the city where he had been employed. This Court held that a municipality has no immunity from liability under Section 1983 flowing from its constitutional violations under the Fourteenth Amendment. *Owen*, 445 U.S. at 657 ("[O]ur decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983."). But the decision by the Ohio Supreme Court which strips away Cleveland Construction's entitlement to damages essentially immunizes the City of Cincinnati from liability for its unconstitutional conduct.

This Court articulated many important policy reasons in *Owen* for awarding damages against municipalities that apply directly to this case. First, the central aim of the Civil Rights Act was to provide protection to those persons wronged by the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the

authority of state law.'" *Owen*, 445 U.S. at 650 (citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961); *United States v. Classic*, 313 U.S. 299, 326 (1941)). A damages remedy against one found liable is a vital component of any scheme for "vindicating cherished constitutional guarantees," and the importance of "assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Owen*, 445 U.S. at 651.

Second, by creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 650-51 (citing *Monroe*, 365 U.S. at 172). Third, the threat that damages might be levied against a city may encourage those in policymaking positions to institute rules and regulations that will minimize the likelihood of further infringements on constitutional rights.[3] *Id.* at 652. Finally, the threat of liability against a municipality should "increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates." *Id.* at 652 n.36.

The principal of deterrence was well articulated by the Second Circuit when it stated:

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[3] This is particularly applicable in this case, where the City of Cincinnati's unconstitutional SBE Program had replaced an earlier contracting program with similar constitutional deficiencies. *See* Kasarda & Luther, *supra* (discussing the City of Cincinnati's previous "Equal Business Opportunity Program" that had been challenged as unconstitutional in another lawsuit that settled prior to trial in 1999).

> Perhaps even more important to society, however, is the ability to hold a municipality accountable where official policy or custom has resulted in the deprivation of constitutional rights. A judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue.

Amato v. City of Saratoga Springs, N.Y., 170 F.3d 311, 317-18 (2d Cir. 1999). The decision of the Ohio Supreme Court in this case does not hold the City of Cincinnati accountable for the deprivation of Cleveland Construction's constitutional rights; nor will it discourage the City or other municipalities from completely reforming problematic "patterns and practices" that give rise to "constitutional violations."

The imposition of constitutional tort damage awards against individual officers or their municipal employees does have a deterrent effect on the behavior of these governmental actors and entities. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 848 (2001). When the government is ordered to pay damages, it is induced to take affirmative remedial steps to eliminate socially undesirable activity. A judgment consisting of just nominal damages, or damages based simply upon the paltry amount of bid preparation costs, only provides disappointed bidders with a symbolic vindication of their claims. But an insignificant award of damages fails to provide real deterrence of future abuses. In

addition, there is a danger that low damage awards will lead to the municipality's tolerance of unconstitutional policies and customs, because of such minor consequences. Similarly, "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

On the other hand, awards that are based upon provable compensatory damages, as Section 1983 contemplates, provide greater incentives for municipalities to be intolerant of constitutional abuses, because of the possibility that voters will discipline the responsible city officials. *See United States v. N. L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973) (Compensatory damages "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.").

Professor Gilles, *supra*, identified three important reasons for awarding compensatory damages for the commission of constitutional torts. The first are the important information functions. When constitutional tort victims pursue litigation motivated by the availability of compensatory damages, the discovery process and media attention unearth the "cultural and political forces" that give rise to the abuses. Gilles, *supra*, at 859.

Second, claims against municipalities cause policy makers to consider reformative measures. It is these officials who "possess[] the resources and broad vantage point with which to identify the particular

deficiencies, and . . . take appropriate corrective action," thereby furthering the deterrence goal of Section 1983 remedies. *Id.* at 863. Finally, Professor Gilles notes that when liability is predicated on a municipality's unconstitutional policies or customs, the imposition of constitutional tort remedies against the municipality will lead to favorably predictable and salutary effects. *Id.* at 867. This assertion is well recognized. Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 Tul. L. Rev. 149, 153 (2001) ("It is no exaggeration to say that almost all commentators today accept the proposition that holding government financially accountable deters future wrongdoing.").

B. The Ohio Supreme Court Decision Departs From Established Public Policy by Failing To Protect Taxpayers From Future Municipal Bidding Abuses

A primary purpose of competitive bidding is to provide for "open and honest competition in bidding for public contracts," and to protect the public and bidders from "any kind of favoritism or fraud in its varied forms." *Cedar Bay Constr., Inc. v. City of Fremont*, 552 N.E.2d 202, 204 (Ohio 1990) (citing *Bd. of Educ. of Chillicothe City Sch. Dist. v. Sever-Williams Co.*, 258 N.E.2d 605, 610 (Ohio 1970)). The use of illegal race-conscious quotas and the arbitrary abuse of discretion by municipalities undermines the purpose of competitive bidding, and erodes faith in elected officials, because such practices encourage favoritism and fraud.

On the other hand, the establishment of color-blind and gender-neutral ordinances and

adherence by municipalities to local rules allow public entities to receive goods and services at the lowest possible cost. As an example, the appellate court in this case noted that the City of Cincinnati solicited bids for the drywall contract two separate times, and each time, Cleveland Construction submitted the lowest bid. *Cleveland Constr.*, 864 N.E.2d at 121-22. Yet the City of Cincinnati rejected Cleveland Construction's bid each time, and ultimately expended over $1.2 million more in taxpayer money by awarding the contract to a higher bidder.[4] The deterrence effect resulting from an award of lost profits is thus required and justified given the facts presented by this case.

It has been argued that a disappointed bidder should not be allowed to recover lost profits because taxpayers would be injured twice: the first time, through the unjustified additional expenditure of funds on the awarded contract and, then, a second time through the necessity of paying a judgment for lost profits to the aggrieved low bidder. *Hardrives Paving & Constr., Inc. v. City of Niles*, 650 N.E.2d 482, 485 (Ohio Ct. App. 1994). However, research has shown this fear to be unfounded. Professors Theodore Eisenberg and Stewart Schwab concluded that constitutional tort litigation under Section 1983 has only a limited impact on the public treasury. *See* Theodore Eisenberg, *Cases and Materials on Civil Rights Legislation* 151-62 (3d ed. 1991) (summarizing Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. Chi. L. Rev. 501 (1989); Theodore Eisenberg & Stewart

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[4] *See Cleveland Constr.*, 864 N.E.2d at 122 (Cleveland Construction's bid was $8,889,000, while the bid of the next lowest bidder was $10,135,022).

Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987); and Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988)).

Professors Eisenberg and Schwab studied field data gathered during the 1980-1981 fiscal year from three major federal districts: the Eastern District of Pennsylvania, the Northern District of Georgia, and the Central District of California. They found that constitutional tort damages comprised only 0.02% of the relevant government entities' budgets. Eisenberg, *supra*, at 159. Even after including the costs of defending lawsuits, Professors Eisenberg and Schwab concluded that their "study could not support new legislative or judicial restrictions on constitutional tort litigation in the name of reducing the federal docket or decreasing the fiscal drain on state and local defendants." Schwab & Eisenberg, *supra*, at 780-81. The empirical observations by Professors Eisenberg and Schwab persuasively refute the policy reasons courts typically rely upon to justify the denial of lost profit awards to disappointed bidders.

Professors Bernard P. Dauenhauer & Michael L. Wells, in *Corrective Justice and Constitutional Torts*, 35 Ga. L. Rev. 903, 923 (2001), further contend that it is not unfair to make taxpayers accountable for the actions of elected officials. This is because the number of taxpayers in a given municipality is generally equal to the number of voters. It is likely, then, that these voters/taxpayers reap whatever benefit is to be obtained by the misconduct of their elected officials. That being the case, "it does not seem unfair to hold

the voters/taxpayers to account for the misbehavior of either the persons they elect or the persons hired by those elected officials." *Id.*

The absence of any damages remedy for violations of all but the most clearly established constitutional rights could have "the deleterious effect of freezing constitutional law in its current state of development," because without a meaningful remedy, aggrieved individuals will have "little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined." *Owen*, 445 U.S. at 651 n.33. Accepting certiorari and reversing the decision of the Ohio Supreme Court will best deter municipalities from conducting future constitutional abuses.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: December, 2008.

Respectfully submitted,

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